

ESTTA Tracking number: **ESTTA778407**

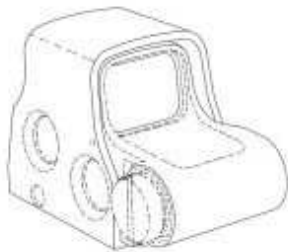
Filing date: **10/23/2016**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	86357904
Applicant	L-3 Communications Corporation
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Submission	Applicants Request for Remand and Amendment
Attachments	Appeal XPS2 86357904 .pdf(535555 bytes)
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Date	10/23/2016

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: L-3 Communications Corporation
Serial No.: 86/357904 for XPS2 Trade Dress (EOT0495TUS)



Examining Atty: STEFAN M. OEHRLEIN
Law Office 115

This document is filed in response to the Examining Attorney's Denial of the Request for Reconsideration.

Pursuant to a phone conversation between Applicant's counsel and the Examining Attorney, Stefan Oehrlein, on September 6, 2016, we respectfully request that the subject application be remanded to the Examining Attorney. *See* TMEP 1504.05 ("The following are examples of circumstances when the Board may remand an application to the examining attorney during an ex parte appeal. . . . When the applicant and the examining attorney agree to a remand.").

Enclosed herewith is the signed Declaration of Melissa Vasilevski.

Considering that the Examining Attorney previously determined that there is sufficient evidence for 2(f) registration based on acquired distinctiveness with respect to the product designs, the application should now be ready for publication.

Please contact the undersigned if anything further is required.

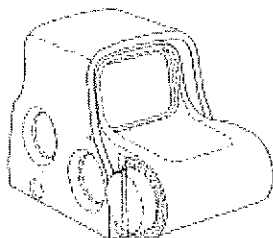
Respectfully Submitted,

By: /hope v shovein/
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Attorney for Applicant

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: L-3 Communications Corporation
Serial No.: 86/357904 for XPS2 Trade Dress (EOT0495TUS)



Examining Atty: Tracy L. Fletcher
Law Office 115

DECLARATION OF MELISSA VASILEVSKI

I, Melissa Vasilevski, declare as follows under penalty of perjury.

1. I am Director of Contracts of L-3 Communications, the Applicant in the above-identified application for trademark registration. I have been employed by Applicant since April 2007.

2. The present application for registration on the principal register is for the unique and distinctive design of the configuration of a firearm sight. This unique firearm sight design has been in continuous and substantially exclusive use beginning no later than June 2009.

3. The configuration of the firearm sight design of this application is a generally "L-shaped" configuration of a firearm sight with the vertical portion of the "L" facing toward the eye of the user and an asymmetrical from front to back housing over the sight opening. This design was chosen to be unique and distinctive from conventional tube and open firearm sight designs and to be readily identifiable as an EOTech firearm sight.

4. The unique and distinctive housing configuration design of the subject trademark application provides no utilitarian advantages to the user or any efficiency in manufacture or cost savings. Actually, this configuration is a more complex design than is required to house the mechanical and electronic internal components of a firearm sight and actually adds to the cost.

Applicant's Patents

5. The features and utility of the Applicant's firearm sights are the subject of numerous patents of Applicant, all of which relate to the mechanical, optical and holographic features of the firearm sights. The following United States patents of Applicant pertain to features and utilitarian components and systems of Applicant's firearm sights: U.S. Patent Nos. 5151800, 5483362, 5815936, 6490060, 7145703, 7225578, 7319557, D66256.

6. The highly distinctive design of the subject trademark application has never itself been the subject of an application for a utility or a design patent. None of the patents listed in the preceding paragraph includes a claim to the specific shape or configuration of the design of the subject application. None of the patents listed in the preceding paragraph includes any discussion or identification of a functional purpose of the shape, configuration or design of the subject trade mark application.

Advertising Promotional and/or Explanatory Materials

7. Since Applicant first sold firearm sights with the unique configuration and design of this application, Applicant has spent well over \$1.8 million promoting its unique L-shaped firearm sights.

8. EOTech has a website at www.eotech-inc.com at which its firearm sights with the trade dress of the subject application are prominently displayed. This site has averaged 1.5 million hits per year.

Clones and Counterfeits

9. Firearm sights bearing the trade dress design of the subject application have been manufactured and sold as clones by counterfeiters who slavishly copy such trade dress in a blatant attempt to deceive purchasers who immediately recognize the unique and distinctive design of the subject application as being an EOTech firearm sight. These counterfeit sights do not utilize the EOTech patented holographic technology. Based on this information and my understanding of the firearm sight market and my perception of consumers and military and law enforcement agencies, no doubt that such consumers, military, and law enforcement agencies recognize the unique trade dress of the housing of the subject application as distinctive and associated with its source, EOTech. The result is that firearm sights are purchased by consumers, military, and law enforcement agencies believing they are buying either a genuine EOTech firearm sight or a firearm sight the same as a genuine EOTech firearm sight based on their recognition of the distinctive trade dress of the firearm sight design, when in fact they are buying extremely poor quality and inferior counterfeit firearm sight. This poses significant risks to consumers. Military and law enforcement officers could be put in extreme danger if they are provided with such a counterfeit or clone firearm sight which copies the trade dress of the subject application.


Trade Shows

10. EOTech attends roughly 50 trade or gun shows per year at which the subject configuration for firearm sights has been prominently displayed.

Distribution and Sales

11. EOTech has over 650 distributors that distribute its firearm sights.
12. EOTech has sold more than 1.1 million sights with the subject firearm sight design of the subject application or that of companion applications (which have a very similar design to the subject application).

I declare under penalty of perjury that the foregoing is true and correct.



Melissa Vasilevski
Director of Contracts, EOTech Division

Dated: August 2, 2016